STATE OF' VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: Viewmont Subdivision Declaratory Ruling #155
Town of Rutland, Vermont

This decision pertains to a Petition for Declaratory Ruling filed with the Environmental Board ("the Board") on May 31, 1984, by Thomas M. Neuffer seeking a determination concerning the applicability of 10 V.S.A., Chapter 151 (Act 250) to the construction of a pond on two lots of the Viewmont Subdivision, Rutland, Vermont.

On June 7, 1984, the Board notified the parties of its intent to-designate its Chairman to act as an administrative hearing officer in this matter pursuant to Board Rule 41 and 3 V.S.A. §811. Having received no objection, a public hearing was convened on July 12, 1984 in Pittsford, Vermont, with Margaret P. Garland acting as hearing officer. The following participated as interested parties at the hearing:

Petitioner Thomas M. Neuffer;
Richard and Joyce Kopsack and John and Helga Wheeler by John J. Zawistoski, Esq.

The hearing was recessed on July 12, pending the filing of memoranda by the parties, preparation of a proposal for decision, a review of the record, and deliberation by the full Board in respect to the threshold issue discussed below. No party having requested a hearing, the Board determined the record complete on October 17, 1984, and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing.

I. ISSUES RAISED BY THE PETITION

The Kopsacks and Wheelers ("Respondents") constructed a pond covering portions of two adjoining parcels owned by the two families within the Viewmont Subdivision, a subdivision which pre-existed the enactment of Act 250. Because Petitioner believes that construction of the pond has had certain negative impacts on his nearby property, Mr. Neuffer believes the pond is a "substantial change" to the pre-existing development which requires a land use permit pursuant to the final sentence of 10 V.S.A. §6081(b). Petitioner refers to impacts under Criteria 1 and 4 of 10 V.S.A. §6086(a).

Respondents' position is two-fold:

1) the addition of a pond by residents of a subdivision, as distinguished from the original developer, is not a "change" to the subdivision:

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2) assuming that pond construction is a "change," the pond has not resulted in any significant impact under any of the ten criteria of 10 V.S.A. §6086(a).

In an effort to simplify and expedite the proceedings, the parties agreed to the preparation of a decision in respect to the Respondents' first argument prior to the completion of the record on the issue of impacts under the ten criteria. Should the Board disagree with Respondents' first argument, the hearing would be reconvened to take further evidence..

II. FINDINGS OF FACT

1. The parties have stipulated, and we find, that the Viewmont Subdivision ("the Subdivision") located in the Town of Rutland, is an exempt subdivision within the meaning of the first sentence of 10 V.S.A. §6081(b). See Exhibit #10.

2. The Kopsacks and Wheelers own two adjoining parcels of land within the Subdivision on the west side of Viewmont Drive. Mr. Neuffer owns a lot directly east of the Wheeler and Kopsack lots, across Viewmont Drive. All three lots have access drives and single family residences located on them. Exhibit #12.

3. During the summer of 1982, the Respondents excavated a small pond, the easterly headwall of which rose approximately three feet above the elevation of near-by' Viewmont Drive. One year later in August of 1983, the Respondents completed excavation of a larger pond straddling the property line shared by Respondents. This larger pond is oval in shape, measures approximately 90' by 120', and is eleven feet deep in the middle. The headwall of the larger pond is approximately 5.5' feet above Viewmont Drive.

4. The pond is used by Respondents for purposes consistent with the residential character of the development: recreational swimming, skating, and fishing.

III. CONCLUSIONS OF LAW

The Petitioner requests our determination concerning whether or not the construction of Respondents' pond is a "substantial change" to the pre-existing Viewmont Subdivision. This decision only addresses the question of "change"; the issue of substantiality (i.e. the extent of any impacts under the ten criteria) has been deferred by the parties until this threshold issue is resolved.

Based upon Exhibit #10 and the parties' stipulation, we conclude that the Subdivision is itself exempt pursuant to the

first sentence of 10 V.S.A. §6081(b). We are asked to apply the final sentence of that section which reads: "Subsection (a) of this section [the bar against construction or subdivision without a permit] shall apply to any substantial change in such excepted subdivision or development.." Board Rule 2(G) defines the' term "substantial change" as follows:

> "Substantial change" means any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. section 6086(a)(l) through (a)(10)./1/

In addressing the interpretation of the term "substantial change," we have historically looked first to whether or not a "change" has occurred or is proposed. See Re: Agency of Transportation - Declaratory Ruling #153, issued June 28, 1984. Further, as we have previously held, one factor to be considered in deciding whether a "change" has occurred is whether or not the alteration is consistent with the basic‘nature of the pre-existing operation. Re: Clifford's Loam and Gravel, Inc. - Declaratory Ruling #90, issued November 6, 1978.

As we have previously found, the activities conducted on ‘or in the pond are consistent with residential use of the premises. A swimming pond, like a swimming pool, while not necessarily -a regular feature of every neighborhood, is certainly well within the scope of amenities ancillary to a residential neighborhood in Vermont. We would not consider a subdivision substantially

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/1/ Board Rule 2(A)(5) which defines the term "development" has been amended since the filing of the Petition. That Rule provides:

> Any construction of improvements which will be a substantial change of a pre-existing development, and any material change to an existing development over which the board or a district commission has jurisdiction.

The term "material change" is also defined in the recent Rule amendments:

> "Material change" means any alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act.

Therefore, the Rules now distinguish between changes to pre-existing developments and changes to projects which are under permit. This decision pertains only to the former category.

changed if a tennis court, car barn, or greenhouse were added. We, therefore, conclude that, because Respondents' pond is consistent with the basic nature of a residential subdivision, installation of the pond does not constitute a "change" to Viewmont Subdivision./2/ We need not move further to consider

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/2/ We hold only that additions which are residential in character do not constitute a "change." We do not conclude that any and all additions are exempt.

IV. ORDER

Because we have concluded that Respondents' pond is not a "Substantial change" to the pre-existing subdivision within the contemplation of 10 V.S.A. §6081(b), no land use permit is required.

Dated at Norwich, Vermont this 17th day of October, 1984.

ENVIRONMENTAL BOARD

By: _____
Margaret P. Garland, Chairman

Board Members participating
in this decision:
Margaret P. Garland
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Dwight E. Burnham, Sr.
Melvin H. Carter
Warren M. Cone